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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1005

W. K. ARCHER AND ERCELL G. WESTFALL, COPART-
NERS DOING BUSINESS AS W. K. ARCHER AND
COMPANY, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 243) is reported in 133 F. (2d) 795. The opinion of the Commission (R. 211), not yet officially reported, is set forth in the Commission's Securities Exchange Act Release No. 3253. The order of the Commission (R. 227) revoked the registration of W. K. Archer and Company as a broker and dealer in securities and

expelled the Company from the National Association of Securities Dealers, Inc., and from the Chicago Stock Exchange.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 6, 1943 (R. 259), and rehearing was denied March 11, 1943 (R. 273). The petition for a writ of certiorari was filed May 6, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, the provisions of which are made applicable by Section 25 (a) of the Securities Exchange Act of 1934.

QUESTIONS PRESENTED

(1) Whether there was substantial evidence to support the Commission's findings that petitioner violated the Securities Act of 1933 and the Securities Exchange Act of 1934 by making false and misleading statements in its application to the Commission for registration as a broker and dealer, and by defrauding certain persons in the purchase and sale of securities.

(2) Whether the court below properly refused to question the remedy of expulsion and revocation adopted by the Commission pursuant to the authority contained in the Securities Exchange Act of 1934.

STATUTES INVOLVED

The pertinent provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and

the Commission's Rules and Regulations are set forth in the Appendix, *infra*, pp. 10-16.

STATEMENT

The Commission's proceeding was begun by a notice and order for hearing issued May 22, 1941 (R. 1-8). A hearing was held, briefs were filed, and oral argument was heard. On June 13, 1942, the Commission issued its opinion, findings, and order (R. 211-228). The findings of the Commission may be summarized as follows:

1. Petitioner, a partnership registered as a securities broker and dealer with the Commission, failed to disclose, in its application for registration, in response to a specific question concerning control of the business, the material fact that a certain Claude Westfall was a person controlling petitioner (R. 214-17). This failure was a violation of Section 15 (b) of the Securities Exchange Act of 1934, which provides that the registration of a broker-dealer may be revoked if the broker-dealer in its application for registration has willfully made false and misleading statements with reference to any material fact.

2. Petitioner defrauded investors by effecting purchases and sales of securities for those investors at prices deviating from the prevailing market prices (R. 217-19), in willful violation of Section 17 (a) of the Securities Act of 1933 and Section 15 (c) (1) of the Securities Exchange Act, which prohibit

the use of fraudulent or deceptive devices in securities transactions.

3. In three specific transactions petitioner defrauded customers in willful violation of Section 17 (a) of the Securities Act and Section 15 (c) (1) of the Securities Exchange Act (R. 219-24).

4. On a number of occasions petitioner violated the provisions of Section 7 (c) (2) of the Securities Exchange Act, and Regulation T thereunder, which pertain to the extension of credit by broker-dealers (R. 226).

The Commission concluded that it was necessary, in the public interest and for the protection of investors, to revoke petitioner's registration as a broker-dealer pursuant to Section 15 (b) of the Securities Exchange Act, and to expel petitioner from the National Association of Securities Dealers under Section 15A (1) (2) and from the Chicago Stock Exchange under Section 19 (a) (3) of that Act. On June 13, 1942, the Commission issued its order of revocation and expulsion (R. 227). The petition for review was filed June 16, 1942 (R. 229), and on February 15, 1943, the Circuit Court of Appeals handed down its opinion affirming the Commission's order (R. 243). A petition for rehearing was denied March 11, 1943.

ARGUMENT

Petitioner's brief suggests that the issues center on a particular transaction involving securities of

the Dewey Portland Cement Company. But, as appears from both the Commission's findings and the court's opinion, that transaction was but one of many violations found by the Commission; it was by no means the sole or even a principal basis for the Commission's order. The Circuit Court of Appeals held that every finding of the Commission was supported by substantial evidence. With one exception the petition does not controvert any of the violations which the Commission found petitioner had committed. These now unquestioned violations by themselves are sufficient to sustain the Commission's order.

In any event, the particular finding which the petitioner challenges, that relating to the Dewey Portland Cement transaction (R. 224), is based on facts clearly involving a violation of Section 15 (c) (1) of the Securities Exchange Act. The admitted facts are as follows (R. 190-196): Petitioner, to fill a securities order placed by a customer, contracted to purchase the securities from a dealer. The dealer was unable to deliver the securities and finally asked petitioner to "buy in" the securities and advise it of the cost of doing so. Although petitioner's customer cancelled his purchase order, petitioner on the same day represented to the dealer that the customer insisted upon the payment of \$300 to compensate him for nondelivery of the securities. Petitioner a few days later collected \$300 from the dealer and retained it. This transaction was

found to be a willful violation of Section 15 (c) (1) of the Securities Exchange Act and Rule X-15C1-2 promulgated thereunder, *infra*, pp. 12-13.

Petitioner argues that this transaction involved no "sale" or "purchase" of securities but only a contract of sale, said to be not within the Act, which in Section 15 (c) (1) deals with the use of fraudulent devices to "effect any transaction in, or to induce the purchase or sale of, any security." The argument fails for two reasons. First, it assumes that the Act cannot apply if the "contract of sale" was not consummated. But Section 15 (c) (1) covers a "transaction" as well as a sale, and it is clear that the settlement of a contract of sale of a security is either a separate transaction in a security or an integral part of the "effecting" of a "transaction" in a security. Certainly Congress must have intended to cover all of the normal incidents of broker-dealer transactions, which regularly extend to the settlement of contractual obligations in the event of failure to deliver the securities contracted for. Therefore, Section 15 (c) (1) embraces misrepresentations made in connection with and to induce the settlement of a securities contract, as well as misrepresentations made in order to induce customers to enter into a securities contract. Second, the argument overlooks the fact that Section 3 (a) (14) defines "sale" to include "any contract to sell or

otherwise dispose of," and Section 3 (a) (13) defines "purchase" as including "any contract to buy, purchase, or otherwise acquire." Petitioner's misrepresentation was related to both the original contract between petitioner and the dealer, and the "buy-in" contract between the same parties.

The petition argues that the dealer was not damaged and, therefore, not "defrauded" by this transaction. This contention is negated by the admitted facts. The dealer was induced by misrepresentation to pay to petitioner an amount greatly in excess of any reasonable claim which petitioner could have made against him.

2. Petitioner contends that the court below erred in refusing to question the remedy of expulsion and revocation as applied to the violations in which the petitioner engaged. The court stated: "The grounds of the complaint against the severity of the Commission's order have been considered, but the Commission has acted in that respect within the power conferred upon it by Congress" (R. 259).

We submit that the position taken by the court below is correct. The statute provides that certain misconduct on the part of a broker or dealer subjects him to revocation of his registration and to suspension or expulsion from certain exchanges and securities associations, if the Commission deems it in the public interest and for the protection of investors so to order. Sections 15A

(1) (2), 19 (a) (3), *infra*, p. 14. Whether the Commission should impose merely a suspension for twelve months or an expulsion from a national securities exchange, was a question which the Congress intended to be decided by the Commission in the light of the public interest and the protection of investors. Congress did not intend that this exercise of an administrative function be reexamined by the courts, except in a case where there is no rational basis for the Commission's action. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584.

Petitioner makes much of the authority granted in the statute to modify an order of the Commission. This power is not at all in conflict with the grant of discretion to the Commission as to the appropriate remedy. It merely provides authority to the courts to modify orders of the Commission when an erroneous rule of law has been applied and where the proper rule of law requires a different remedy than that applied by the Commission.

There is no conflict of decisions on this question. The only other case directly in point is in accord. *Wright v. S. E. C.*, 112 F. (2d) 89 (C. C. A. 2d); *id.*, C. C. A. 2d, April 3, 1943.

CONCLUSION

There is no conflict of decisions and the petition presents no question which warrants review by this Court. The petition should, therefore, be denied.

Respectfully submitted.

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MAY 1943.